Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

COMMENTS OF

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SUMMARY

Business Telecom, Inc. ("BTI") entered the telecommunications services marketplace in 1983 as a provider of interexchange telecommunications services. Since that time, the Company has evolved into a facilities-based provider of local and interexchange telecommunications services. BTI's history parallels the evolution of competition envisioned by Congress when it passed the 1996 Telecommunications Act.

In the *Triennial Review*, the Commission is seeking comment on whether it should modify the list of specific elements unbundled by virtue of the *UNE Remand Order*. BTI submits that it is premature to modify the existing list of unbundled network elements. Facilities-based competition has not sufficiently developed for the Commission to start restricting access to UNEs or to modify the existing list.

A critical element for local competition is the unbundling of local switching. The underlying policy that informed the Commission's adoption of this unbundled network element was to counteract the material scale advantages that incumbents possess in regard to the provisioning and operating of local circuit switches. Incumbents still enjoy the same scale advantages today. Additionally, the capital markets are much less likely to fund CLEC operations now then they were at the time of *UNE Remand Orde*r. This means that the substantial capital that CLECs require in order to install facilities is much harder to obtain and makes the availability of unbundled local switching all the more important to facilities-based CLECs.

The *UNE Remand Order* mandated unbundling of local switching because of the greater costs CLECs face when they have lower penetration levels. Competition has not developed to the point where this economic reality is no longer relevant. Further, facilities-based carriers

expanding into new markets face non-existent penetration levels. This exacerbates other costs associated with installing facilities in new markets. Aside from costs associated with switches, collocation is also extremely expensive. Competitive carriers must attract a critical mass of customers prior to the installation of facilities. The availability of unbundled local switching remains an essential market expansion strategy for facilities-based CLECs.

Aside from the costs associated with installing new facilities, it takes a substantial amount of time for CLECs to install new facilities due to CLEC reliance on incumbents provisioning the necessary support services. Therefore, the availability of UNE-P allows carriers to rapidly serve larger customer volumes than they would be able to if UNE-P were not available. Additionally, since competition is still in its infancy, there is no data that suggests facilities-based competition on a broad scale is possible given the lack of resources dedicated by incumbents to support CLEC facilities-based deployment. Until incumbents have demonstrated performance in the timely and efficient provisioning of all the elements on which CLECs rely in order to provide service over new facilities, the Commission must preserve the availability of UNE-P.

Facilities-based CLECs require enormous amounts of capital to build and expand their networks. The current investment climate requires CLECs to demonstrate that they can attract enough customers to justify the risk of private investment. The Commission recognized in the *UNE Remand Order* that the availability of UNE-P allows CLECs to test demand for new facilities-based services prior to the deployment of new facilities. UNE-P remains an essential tool for CLECs in attracting private capital.

Contrary to incumbent LEC claims, UNE-P is not a substitute for facilities-based networks. Facilities-based CLECs rely on the availability of UNE-P to expand into new markets.

Further, UNE-P only allows CLECs to access the incumbent's narrowband network for the provision of voice services. CLECs must invest in facilities that allow for the provision of broadband services so that CLECs can compete in a marketplace that demands bundled services. Thus, UNE-P will always be simply a means to the end of facilities-based market entry and expansion.

The Commission should continue to mandate the availability of UNE-P for the simple reason that it has had demonstrated success in allowing CLECs to acquire customers. While incumbents still utterly dominate more than 90% of the local exchange marketplace, UNE-P has allowed carriers in specific markets to attract customers away from the incumbent. UNE-P not only introduces competition at a much more rapid rate than other market entry strategies, it also frees scarce resources, such as collocation space and technician time, to provide more efficiently and effectively full service loops throughout the entire service area of the incumbent.

Finally, the Commission should reevaluate the restrictions currently in place with Enhanced Extended Links ("EELs"). The policy issues that led the Commission to impose restrictions on EELs are no longer relevant in light of the Commission's adoption of the *CALLS Order*.

I. INTRODUCTION

Business Telecom, Inc. ("BTI") submits these comments in the above-captioned proceedings. BTI is a facilities-based integrated communications provider offering voice and data communications services primarily to small and medium-sized business customers in the Southeastern United States. BTI offers a full suite of integrated retail, including local, long distance, data, DSL, Internet access, web hosting, paging and other enhanced services. The Company also offers wholesale services, including switched, private line, special access and prepaid calling card services to other telecommunications carriers and end-user customers.

II. HISTORY OF BUSINESS TELECOM, INC.

BTI's history parallels Congress' conception of the development of competition as envisioned in the 1996 Telecommunications Act. BTI was founded in 1983 as an interexchange reseller serving small to medium-sized businesses. The Company established itself in the resale interexchange marketplace and transitioned into a provider of facilities-based interexchange services along with its resale interexchange service offerings. After Congress passed the Telecommunications Act of 1996, BTI entered the local exchange telecommunications marketplace. BTI's initial market entry into the local exchange marketplace was as a reseller. Over time and with additional funding, BTI was able to evolve into a facilities-based provider of local exchange services.

Over the course of close to twenty years, BTI now provides a full complement of telecommunications services to its customers with the majority of the Company's traffic flowing over its own facilities. BTI remains committed to expanding its facilities-based local exchange and interexchange telecommunications services network. In expanding its service footprint, BTI relies on the availability of UNE-P as a market entry strategy. For a myriad of reasons, UNE-P, rather than resale, is essential to BTI and to the competitive telecommunications industry.

III. THE COMMISSION MUST NOT REDUCE OR RESTRICT THE EXISTING LIST OF UNES.

In the *UNE Remand Order*, the Commission established a framework for determining whether a particular network element should be unbundled. Looking to the applicable statutory language set out in the Act, the Commission found that two separate standards applied when mandating access to network elements. By virtue of the different terminology used in Section 251(d)(2)(A) and 251(d)(2)(B), the Commission found that different standards apply to unbundling proprietary and non-proprietary network elements. The Commission concluded that a proprietary network element is "necessary" within the meaning of Section 251(d)(2)(A) if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer."[1] Under Section 251(d)(2)(B), the Commission adopted a less stringent requirement for access to a non-proprietary unbundled network element to reflect the difference in language. The Commission determined that access to a non-proprietary network element is "impaired" if "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."[2] The Commission then applied the adopted standards to re-examine its national list of unbundled network elements.

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[1] *See Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, Third Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 ("*UNE Remand Order*") at ¶ 44 (emphasis in original).

[2] *Id.* at ¶ 51.

In the *Triennial Review*, the Commission is seeking comment on whether it should modify the list of specific elements unbundled by virtue of the *UNE Remand Order*.[3] BTI believes that it would be premature for the Commission to change the list of available UNEs at this time. Facilities-based competition has not sufficiently developed for the Commission to restrict access to UNEs or to modify the existing list. Further, the geographical restrictions placed on the availability of UNE-P have reduced the viability of this market expansion strategy and should be eliminated. BTI's comments focus on these issues.

IV. THE POLICY REASONS FOR ESTABLISHING UNE-P IN THE UNE REMAND ORDER HAVE NOT CHANGED

The *Triennial Review* seeks comment concerning specific network elements and whether the Commission should modify existing unbundling requirements.[4] Specifically, the Commission is seeking comment on whether it should retain the requirement that incumbents provide access to "local switching capability" and "tandem switching capability" for the provision of a telecommunications service.[5] The Commission defined "local circuit switching capability" to include "line-side facilities," "trunk-side facilities," and all the features, functions and capabilities of the switch.[6] The Commission is seeking comment on whether it should retain or modify these unbundling requirements or the existing definitions for these network elements in light of changed circumstances.[7]

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3 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking, CC Docket No. 01-338, FCC 01-361, released December 20, 2001 ("Triennial Review").*at ¶¶ 47-74.

4 *See id.* at ¶¶ 47-74.

5 *See id.* at ¶ 55.

6 47 C.F.R. § 51.319.

7 *See Triennial Review*, *supra* note 3, at ¶ 55.

In the *UNE Remand Order*,[8] the Commission determined that competitive carriers required access to incumbent's elements on a broader basis so as to not impair the ability of CLECs to provide service on an MSA, LATA or statewide basis.[9] The Commission stated that the lack of access to "unbundled local switching materially raises entry costs, delays broad-based entry, and limits the scope and quality of the new entrant's service offering."[10] The Commission further found that since incumbent LECs retain material scale advantages with regard to the provisioning and operating of local circuit switches, competitive carriers encounter "greater direct costs per subscriber when provisioning their own switches, particularly in the early stages of entry when requesting carriers may not have the large numbers of customers that is necessary to increase their switch utilization rates significantly."[11]

The underlying reasons that informed the Commission decision to allow competitive carriers to have access to the switching capabilities of incumbent LECs have not significantly changed to justify a policy change at this time. In fact, the current investment climate in the financial markets suggests that the conditions relied upon by the Commission in issuing the *UNE Remand Order* have significantly worsened. In the *UNE Remand Order*, the Commission noted that "it is too early to know whether self-provisioning is economically viable in the long run, although the capital markets appear to be supplying requesting carriers with access to capital in the absence of demonstrated profitability."[12] As the Commission is aware, this is no longer the case. With funding very difficult to obtain and the economies of scale tipped very heavily in

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8 *See generally, UNE Remand Order*, *supra* note 1.

9 *See UNE Remand* Order, *supra* note 1, at ¶ 126.

10 *See UNE Remand Order*, *supra* note 1, at ¶ 253.

11 *See UNE Remand Order*, *supra* note 1, at ¶ 260.

12 *See UNE Remand Order*, *supra* note 1, at ¶ 256.

favor of the incumbent LECs, the Commission must continue to make UNE-P available to CLECs.

BTI has recently relied upon the availability of UNE-P in the face of restricted access to capital. In several markets, BTI had to delay the installation of facilities due to the lack of capital. In these markets, BTI cancelled switch orders as well as collocation contracts and incurred substantial penalties because the Company could simply not attract the capital necessary to install facilities. The availability of UNE-P allowed BTI to attract customers in these markets and BTI plans to eventually install facilities when the Company can attract the necessary capital. Resale is not a viable option for the Company as the wholesale discount does not provide enough of a margin for the Company to justify investment. Resale requires the same back office support costs as UNE-P but is significantly more expensive making it an unattractive option for facilities-based carriers. UNE-P has been a valuable resource allowing BTI to continue with its expansion plans and the eventual installation of facilities even though the capital markets will not currently support immediate facilities-based expansion.

One of the main purposes of the *1996 Telecommunications Act* was to rapidly introduce competition in the provision of local exchange services.[13] As the agency responsible for implementing and safeguarding the goals of the *1996 Telecommunications Act*, the Commission must continue to ensure the widespread availability of UNE-P until competition takes a firm hold in the local exchange marketplace. UNE-P will continue to play an important role in facilities-based CLEC market expansion plans due to the current investment climate. With incumbent LECs maintaining a greater than 90% market share for the provision of local exchange

[13] *See UNE Remand Order*, *supra* note 1, at ¶ 272.

services,[14] coupled with the lack of investment from the capital markets, it would premature for the Commission to abandon UNE-P. UNE-P is the most successful method of rapidly introducing competition into the local exchange marketplace and a critical resource relied on by facilities-based CLECs seeking to expand into new markets.

V. UNE-P ALLOWS FACILITIES-BASED CLECS TO OVERCOME BARRIERS TO ENTRY ASSOCIATED WITH ECONOMIES OF SCALE

The availability of UNE-P allows CLECs to serve new customers rapidly without immediately incurring substantial nonrecurring costs associated with switches, transport and collocation. The costs of each of these core elements associated with the provision of facilities-based telecommunications services pose substantial competitive barriers to facilities-based CLECs seeking to expand into new markets. UNE-P assists CLECs in attempting to overcome the economies of scale that greatly benefit incumbents.

As recognized in the *UNE Remand Order*, CLECs incur greater costs when self-provisioning switching at low penetration levels.[15] The economics described in the *UNE Remand Order* have not changed as CLECs remain small carriers even in markets where they have deployed their own facilities. The economies of scale enjoyed by incumbents have yet to be matched by CLECs. When facilities-based CLECs decide to expand into a new market, their penetration level is non-existent. UNE-P remains a vital market expansion strategy for such carriers. The inability of facilities-based CLECs to achieve switching scale economies immediately in new markets impacts the ability of CLECs to offer services in competition with incumbent LECs. As the Commission recognized in the *UNE Remand Order*, "unbundled switching is likely to mitigate this early stage entry barrier and is consistent with Congress'

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[14] *See generally, Telecommunications Industry Revenues 2002*, Industry Analysis Division, Commo Carrier Bureau, Jim Lande and Kennth Lynch (Jan. 2002).

[15] *See UNE Remand* Order, *supra* note 1, at ¶ 260.

intention that [CLECs] use unbundled network elements as a transitional market entry strategy."[16]

In order to duplicate the facilities of an incumbent, CLECs must also collocate. The decision by a CLEC to collocate presumes a significant market penetration even in dense wire centers.[17] When entering new markets, a facilities-based CLEC must attract a critical mass of customers *prior to* installing facilities in order to justify the nonrecurring charges associated with the provision of facilities-based local exchange telecommunications services. UNE-P is the only economically viable vehicle available to facilities-based CLECs that allows them to acquire the requisite penetration levels that then justifies collocation and the later deployment of facilities.

Facilities-based CLECs incur additional expenses associated with coordinated loop cutovers after establishing collocation with the incumbent. These costs are almost exclusively incurred by the CLEC as the incumbent does not submit a significant number of coordinated loop cutovers requests to CLECs. The nonrecurring costs associated with this process further impede facilities-based CLECs from installing their own facilities.[18]

The factors outlined by the Commission in the *UNE Remand Order* as substantial barriers to CLECs competing with incumbents in the facilities-based local exchange telecommunications services marketplace still exist today. In the *UNE Remand Order*, the Commission determined that switching should be unbundled in order to help in overcoming the obstacles to competition in the local loop.[19] The market realities facing facilities-based providers of local exchange telecommunications services have not changed in any appreciable way to justify the abandonment of UNE-P. Currently, as noted, above, CLECs face even more formidable barriers

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16 *See UNE Remand Order*, *supra* note 1, at ¶ 261.

17 *See UNE Remand Order*, *supra* note 1, at ¶ 263.

18 *See UNE Remand Order*, *supra* note 1, at ¶ 266.

in the financial markets then when the Commission adopted the *UNE Remand Order*. At the same time, Commission action has reduced CLEC access charge and reciprocal compensation revenues exacerbating capital needs. The new market component of these rules puts an even greater burden on CLECs trying to expand their markets. Accordingly, the Commission should continue to require incumbents to offer unbundled switching capabilities to facilities-based CLECs.

VI. UNE-P ALLOWS CLECS TO RAPIDLY SERVE LARGER CUSTOMER VOLUMES

Aside from the costs associated with installing facilities, it takes a substantial amount of time to provision services over new facilities. As recognized in the *UNE Remand Order*, it can take six months to a year to engineer, furnish and install a switch.[20] This timeline has not changed in any appreciable manner in the last two and a half years. Furthermore, competition for mass-market customers remains in its infancy so there still is no data available to suggest that incumbents could efficiently handle competition on a broad scale. Until the existing delays associated with the installation of new equipment and the provisioning of service are greatly reduced and the incumbents have *demonstrated* performance in timely and efficient provisioning of collocation trunks, order processing and coordinated loop cutovers on a mass scale, the Commission must preserve UNE-P.

VII. UNE-P ALLOWS FACILITIES-BASED CLECS TO ATTRACT CAPITAL FOR NETWORK EXPANSION

Equally important to rapidly serving customers when expanding into a new service area is the ability of facilities-based CLECs to attract private capital to fund plans for service expansion. As the Commission is aware, the provision of facilities-based local exchange

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19 *See UNE Remand Order*, *supra* note 1, at ¶¶ 253-275.

20 *See UNE Remand Order*, *supra* note 1, at ¶ 268.

services requires an enormous amount of capital. Facilities-based CLECs, unlike incumbents, do not have a captive rate base from which they can extract the necessary capital to maintain and improve their telecommunications network. Facility-based CLECs are completely reliant on private equity. In order to attract private investment to fund expansion plans, facilities-based CLECs must demonstrate that they can attract the customers necessary to justify the risk of investment. The Commission recognized in the *UNE Remand Order* that UNE-P allows CLECs to test demand for new circuit switched services before deploying their own facilities and allows CLECs to generate revenues to justify the construction of new switching facilities resulting in accelerating the development of alternative networks.[21] The ability of CLECs to illustrate demand to the private equity markets prior to deploying facilities is even more essential in the current investment climate. In order to gain access to the substantial capital necessary to expand networks, facilities-based CLECs continue to require access to UNE-P.

VIII. UNE-P IS NOT A SUBSTITUTE FOR FACILITIES-BASED NETWORKS

The incumbent LECs' claim that UNE-P limits a CLEC's incentive to invest in its own facilities is baseless. UNE-P allows CLECs to use only the incumbent's narrowband network for the provision of voice services. In order to leverage that investment into more profitable service offerings, CLECs must invest in facilities that allow for the provision of broadband services that complement the service line that exists by virtue of UNE-P. CLECs can use UNE-P to provide voice service in a package with xDSL service. The xDSL service offered by the CLEC is a product of its own investment. By packaging services, the CLEC is able to compete in a

[21] *See UNE Remand Order*, *supra* note 1, at ¶ 274.

marketplace that demands service bundling,[22] but is able to do so without needlessly replicating the voice network until economically justified.

IX. UNE-P CONTINUES TO BE THE MOST SUCCESSFUL MARKET EXPANSION AND ENTRY STRATEGY FOR CLECS

In facilitating CLEC entry into the local telecommunications services marketplace, UNE-P allows CLECs to attract revenues and customers more rapidly than any other market entry strategy. Data from the Georgia local exchange telecommunications marketplace provides persuasive evidence as to the benefits of UNE-P. The penetration rates of UNE-P lines versus lines served by CLECs using UNEs in combination with their own switching equipment illustrates the tremendous competitive benefits associated with UNE-P. BellSouth did not offer UNE-P at cost-based rates until February 2000. By June 2000, the number of lines served by UNE-P was 26,708. In June 1999, after UNEs had been available for more than three years to CLECs that provided their own local switching equipment, 26,646 lines were served. Thus, in four months, UNE-P achieved a penetration rate that switched-based CLECs did not reach for more than three years.[23] Furthermore, by December 2000, eight months after UNE-P was available at cost-based rates, switched-based CLECs were serving only 2,630 lines more than UNE-P providers.[24] By September 2001, UNE-P providers served more than double the lines than those served by switch-based CLECs. In terms of introducing competition into the residential marketplace, UNE-P remains essential. Of the total lines served by UNE-P in Georgia, 60% were residential lines.[25]

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[22] CLECs that have attempted to offer standalone data services have been punished by the marketplace as evidenced by the bankruptcies of Covad, Rhythms and Northpoint.

[23] *See* BellSouth's Response to the FCC's Fifth Survey on Local Competition; BellSouth's Form 477.

[24] *See id*. The relevant numbers are 78,068 lines served by UNE-P providers and 80,698 lines served by switched-based CLECs in December 2000.

[25] *See id*. The relevant numbers are 190,073 lines served by UNE-P providers and 87,082 lines served by switched-based CLECs.

The local exchange telecommunications markets of New York and Texas confirm the impact of UNE-P on these markets. In New York, a total of 19.7% of the lines are served by resale, UNE-P and switched-based CLECs. Of that total, UNE-P accounts for 14.5%, resale 3% and switch-based CLECs 2.2%. Similarly, in Texas where a total of 17.7% of the lines are served by resale, UNE-P and switched-based CLECs, 13.3% of the lines are served by UNE-P, 3.3% are served by resellers and switched-based CLECs serve 1.1% of the lines.[26]

The penetration rate by UNE-P providers demonstrates that UNE-P is an effective market entry and expansion strategy for CLECs. UNE-P not only introduces competition at much more rapid rate than other market entry strategies, it also frees resources, such as collocation space and technician time, to provide more efficiently and effectively full service loops throughout the entire service footprint of the incumbent. UNE-P is successful because it addresses each of the most critical impairments that prevent CLECs from offering "mass market" services. Fundamental operational problems and cost associated with installing and implementing a new switch are avoided by the availability of UNE-P. Establishing a ubiquitous presence within a service area is easily accomplished with UNE-P. Since CLECs are able to attract customers at a faster rate by virtue of UNE-P, CLECs are able to reach the economies of scale required to justify facilities-based investment at a faster pace than if UNE-P is not available as a market expansion strategy. UNE-P enables the necessary market conditions to develop to allow for facilities-based investment by CLECs. Rather than replacing facilities-based deployment, UNE-P encourages CLECs to deploy additional facilities in new markets.

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[26] *See Assessing the Effectiveness of Section 271 Five Years After the Telecommunciations Act of 1996*, Daniel R. Shiman and Jessica Rosenworcel, October 2001.

X. THE BENEFITS OF UNE-P CAN BE SEEN IN THE HIGHLY COMPETITIVE INTEREXCHANGE MARKETPLACE

UNE-P is not a market entry strategy limited to CLECs. During the review of SBC's merger with Ameritech, SBC revealed that its out-of-region market entry strategy was premised on the availability of network elements to serve both the residential and small business markets.[27] The benefits of UNE-P are also illustrated in the success of SBC and Verizon in claiming substantial market shares in the long distance market. SBC and Verizon have been extremely successful in claiming substantial market shares in the long distance market in a very short period of time. Aside from already having the necessary operational expertise to provide such telecommunications services, both companies had the equivalent of UNE-P available to them in the long distance market. Rather than having to create a long distance infrastructure, SBC and Verizon were able to utilize the services of wholesale long distance providers that offered end-to-end transmission and switching. Furthermore, a fully automated provisioning system, in the form of the PIC change process, allows for the rapid, inexpensive and reliable migration of customers to SBC and Verizon in the long distance telecommunications marketplace. These carriers will ultimately introduce their own facilities to provision service when the economies of scale justify such an investment. In this manner, the experience in the interexchange marketplace is instructive as to how UNE-P will benefit facilities-based CLECs that desire to expand their service area.

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[27] *See* Deposition and Testimony of James Kahan on behalf of SBC, Public Utilities Commission of Ohio, Case No. 98-1082-TP-AMT.

XI. THE COMMISSION SHOULD REEVALUATE EEL RESTRICTIONS

The Commission is seeking comment on the restrictions in place concerning Enhanced Extended Links ("EELs").[28] Specifically, the Commission is inquiring as to whether the safe harbors adopted by the Commission appropriately target CLEC impairment to local exchange service. BTI recommends that the Commission reevaluate the current restrictions associated with EELs due to changes in the underlying facts that informed the Commission's decision to restrict EELs.

In its *Supplemental Order Clarification*, the FCC established the procedures by which a requesting carrier may convert special access circuits to unbundled loop-transport combinations.[29] To initiate the process, a requesting carrier must certify to the incumbent LEC that it is providing a significant amount of local exchange service over circuits currently purchased through the incumbent LEC's access tariffs, and specify the local usage option under which the requesting carrier seeks to qualify. Once a requesting carrier properly certifies that it is providing a significant amount of local exchange service, the FCC required that the process by which special access circuits are converted to unbundled loop-transport combinations should be "simple and accomplished without delay."[30] Thus, if a requesting carrier certified that it was the exclusive provider of local exchange service, or if it certified that it meets certain traffic thresholds and other conditions, the incumbent was to make EELs immediately available to the requesting carrier.[31]

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[28] *See Triennial Review*, *supra* note 3, at ¶¶ 70-71.

[29] *See* generally, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, CC Docket No. 96-98, 15 FCC Rcd 9587 (2000) (*Supplemental Order Clarification*).

[30] *Id. at* para. 30.

[31] *See id.* at ¶¶ 22, 28.

EEL restrictions should be reevaluated because the potential legal or policy issues associated with CLECs use of EELs are no longer relevant. The Commission's overwhelming concern for adopting the EEL restrictions concerned the legal or policy ramifications of applying unbundling rules in a way that could cause a significant reduction of incumbent's special access revenues prior to full implementation of universal service and access charge reform.[32] However, the Commission's adoption of the *CALLS Order* now makes such arguments moot.[33] As a result of the *CALLS Order*, all implicit subsidies have been removed from interstate access charges and replaced with explicit subsidies in the universal service fund. Any negative effect that incumbents may have suffered from bypass of special access charges is no longer relevant to the provision of EELs by incumbents to competitive carriers.

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[32] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760 (1999).

[33] *See Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (May 31, 2000)("*CALLS Order"*).

XII. CONCLUSION

The availability of UNE-P continues to be of great importance to facilities-based carriers seeking to expand into new service areas. It is premature for the Commission to alter the availability of unbundled switching elements for numerous reasons. The policy justifications for ordering the availability of switching elements as UNEs have not changed in the two and half years since the Commission's adoption of the *UNE Remand Order*. Incumbents retain enormous economies of scale advantages in the local exchange telecommunications marketplace. The availability of UNE-P allows facilities-based CLECs to expand rapidly into new markets and to attract capital in tight financial markets for service expansion. UNE-P is not a substitute for facilities-based networks and has proven successful in multiple markets as a catalyst for competition in the local loop. The Commission should reevaluate the restrictions associated with EELs. The policy reasons for restricting the availability of EELs are no longer relevant.

For these reasons, the Commission must continue to mandate that incumbent LECs provide unbundled switching elements in the same manner as required by the *UNE Remand Order* and reevaluate the restrictions associated with the provision of EELs.

Respectfully submitted,

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April 5, 2002